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No. 82-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC., *Petitioner*,

v.

OLLIE T. HILL, *et al.*, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the court below correct in holding that class members in an employment discrimination case may seek post-trial to intervene as class representatives where they moved to intervene as soon as it became apparent that the original class representatives lacked standing to represent them, and where no party would be prejudiced by intervention?

2. Was the court below correct in holding that the district court is not without discretion, upon remand of the case, to reinstate its findings of hiring discrimination, which had been vacated solely because the original class representatives lacked standing to represent the class, if it finds, *inter alia*, the proposed intervenors to be adequate class representatives and allows them to intervene, and if it determines that no party will be prejudiced by the reinstatement?

3. Did the court below apply a proper standard of appellate review in finding that the reasons given by the district court for denying intervention were either without foundation in the record or inadequate as a matter of law?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents hereby respond to and oppose Petitioner Western Electric Company, Inc.'s petition that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals entered on March 1, 1982.

STATEMENT OF THE CASE

The original complaint in this case was filed on May 14, 1975 by six black and female present or former employees of Western Electric Company, Inc. ("Western Electric" or "Western"), who claimed that Western unlawfully discriminated against blacks and females in hiring, job assignments and promotions, contrary to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and Section 1 of the Civil Rights Act of 1966, 42 U.S.C. § 1981. The United States District Court for the Eastern District of Virginia (Hon. Albert V. Bryan, Jr.), based on the Fourth Circuit Court of Appeals' decision in

Barnett v. *W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975), certified a class, on November 21, 1975, consisting of all blacks and all females who unsuccessfully sought or would seek employment, or who had been employed, at Western's Arlington, Virginia facility at any time since July 2, 1965.[1]

This case was tried to the bench in February 1976, following a period of extensive pretrial discovery. On April 30, 1976, Judge Bryan issued a Memorandum Opinion in which he found Western guilty of unlawful race and sex discrimination in hiring, job assignments and promotions. With respect to discrimination in hiring, all the jobs at issue were unskilled jobs for which no prior training or experience were required, and the district court found, *inter alia*, that

> a) Western hired only 12.7% of the black applicants for unskilled, entry-level service center jobs as compared to 29.8% of the white applicants; *Hill* v. *Western Electric Co.*, 12 FEP Cas. 1175, 1179 (E.D. Va. 1976), and that
>
> b) Western hired only 17.9% of the black applicants for unskilled entry-level installer jobs as compared to 45.7% of the white applicants . . . . *Id.*

The district court further found that Western Electric relied upon an invalid and unfair preemployment test to screen applicants for employment as installers which had

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[1] The Arlington, Virginia "facility" had responsibility for employees at Western Electric's Washington Service Center (the "Service Center"), which served to store, assemble, and repair telephones in the Washington metropolitan area and for the Washington Installation District, which covered Washington, D.C. and its Virginia and Maryland suburbs and was responsible for installing telephone equipment at AT&T operating subsidiaries and other locations.

a severe adverse impact on blacks: "Only 23.5% of the blacks who took the 'Installer's Test Battery' . . . passed, while 57.6% of the whites who took the test battery passed." *Id.* at 1180.

On October 21, 1976, Judge Bryan issued a remedial decree, setting forth the relief to be afforded to class members. This decree was amended by an order dated November 2, 1976.

On appeal, the Fourth Circuit Court of Appeals affirmed Judge Bryan's findings as to Western's race and sex discrimination in job assignments in the Service Center but reversed the district court's findings as to discrimination in promotions. *Hill* v. *Western Electric Co.*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979) *("Hill I")*. With respect to Western's discrimination in hiring, the court concluded that at the time of certification and the district court's decision the existing law in the Fourth Circuit, under *Barnett* v. *W. T. Grant Co.*, *supra*, was such that the named plaintiffs, all of whom had been hired by Western, arguably could represent those not hired. 596 F.2d at 101. It found, however, that the law had since changed, and that under the subsequent decision of this Court in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), the named plaintiffs lacked standing to represent unsuccessful applicants for employment or to challenge Western's hiring practices. 596 F.2d at 101-02. On this basis, the court vacated Judge Bryan's findings as to hiring discrimination without considering the merits of those findings.

On January 17, 1980, upon remand of the case to the district court, three members of the class who had been denied employment by Western filed a motion to intervene, with supporting affidavits and a memorandum of law, on their own behalves and as representatives of

other unsuccessful applicants for employment who, pursuant to the Court of Appeals' April 9, 1979 decision, could not then be represented by the original named plaintiffs. All three proposed intervenors were already members of the class certified by Judge Bryan on November 21, 1975, a class which included "all black persons and all female persons who have applied for employment at Defendant's facility in Arlington, Virginia since July 7, 1965, or who will hereafter apply."

As set forth in their affidavits, two of the proposed intervenors alleged that they were required to take and pass the same preemployment test for installers that the district court found discriminatory, and declared unlawful, in April 1976. They were informed by Western that their applications were denied because they failed to pass this test. The third proposed intervenor alleged that Western's refusal to hire her at the Service Center in 1973 was the result of discriminatory personal interviews, which have continued, without interruption, to the present. Thus, the claims of the proposed intervenors were identical to the claims of discrimination in hiring raised, and previously litigated, by the named plaintiffs. Judge Bryan issued a ruling from the bench at the conclusion of oral argument, on February 8, 1980, denying the motion to intervene.

The district court did not consider whether the intervenors were adequate class representatives. Rather, it held that intervention was inappropriate primarily because of the length of time the case had gone on. The district court judge felt that "[i]t's time this case got concluded." (App. 41a)[2] The judge also felt that it would

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[2] "App." references are to the Appendix to Western Electric's Petition for a Writ of Certiorari. "Pet." references are to the text of Western Electric's Petition for a Writ of Certiorari.

be impractical for him to consider the hiring claims at the same time that other portions of the case, on which the Fourth Circuit had affirmed the findings of liability, were before a special master on the issue of damages. *(Id.)*

The Fourth Circuit in its decision below held that these two reasons were, as a matter of law, an insufficient basis for denying intervention. The court noted that under well-established precedent, the mere passage of time does not, in and of itself, constitute a sufficient basis for denying a motion to intervene under Rule 24(b). (App. 5a) The critical inquiry, the court held, is whether the intervenors moved to intervene in a timely fashion and whether intervention would prejudice any party. (App. 5a-7a)

The court below found that the proposed intervenors had acted in a timely fashion in that they had moved to intervene in order to protect their interests as soon as it became clear, following *Hill I*, that the original named plaintiffs could not do so. (App. 6a)

Even more importantly, the court said, intervention would not result in prejudice to any party. The court noted that Western Electric had been aware from the outset of the action that it might be liable to the class on hiring claims, and thus could not claim any prejudice from the effort of class members to intervene. (App. 7a) Indeed, Western has never claimed, and does not claim in its present petition, that it would be prejudiced in any fashion by intervention.

The court next considered whether intervention would prejudice any of the members of the class whose claims had been affirmed in *Hill I* and were, at the time of the district court's decision, to have been placed before a

special master on the issue of damages.[3] The Fourth Circuit held that this bifurcation of the proceedings would not have worked a prejudice on the members of the class. The court noted that while the district court had found such a procedure to be "impractical if not impossible," neither it nor Western Electric had offered any reasons why this should be so. (App. 7a) The Court of Appeals found the district court's finding of impracticality to be unsupported and contrary to precedent in equal employment cases, where bifurcation of cases is "commonplace." (App. 7a-8a)

The court also found that in considering the motion to intervene, the district court failed to consider the possibility that it might reinstate its original findings of hiring discrimination to the extent the claims were previously adjudicated. If reinstatement occurred, the court noted, it would save the proposed intervenors and the district court from having to relitigate those issues and promote judicial efficiency. If the district court found that reinstatement would be proper, the Court of Appeals held, it would be a factor weighing in favor of allowing intervention. (App. 8a-9a) The court indicated that reinstatement of the findings would only be appropriate so long as no party had been prejudiced by the original named plaintiffs' lack of standing to represent the class. (App. 9a-10a)

The Court of Appeals remanded the case to the district court for further consideration of the motion to intervene. The court noted, however, that Western Electric had

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[3] These aspects of the case, as well as all other aspects except for the hiring claims, were in fact subsequently the subject of a settlement between plaintiffs and Western Electric.

raised a number of procedural and jurisdictional issues regarding the ability of the proposed intervenors to sue, wholly apart from any issues regarding the propriety of intervention, and that the district court never addressed these issues.[4] The court directed the district court to address those issues "as a preliminary" to any consideration of the propriety of intervention, class certification, or of the reinstatement of the findings. Only if the district court rules for the proposed intervenors on these "preliminary" issues, the court held, should it proceed to any consideration of intervention and reinstatement of the findings.[5] (App. 13a-15a)

REASONS FOR DENYING THE WRIT

Western Electric attacks the Fourth Circuit's decision on three grounds. First, Western contends that the court's decision is contrary to decisions of this Court and of the other lower courts. Second, Western asserts that the decision below will promote "spurious class actions." Finally, Western claims that the Court of Appeals ignored proper standards of appellate review in reversing the district court.

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[4] These issues include whether two proposed intervenors who applied in Landover, Maryland applied at a "successor facility" of the Arlington facility originally at issue in the case; whether another proposed intervenor's claim is time-barred; and whether Western had an adequate notice of and opportunity to conciliate the hiring claims.

[5] Western's applications for a stay of the Fourth Circuit's mandate were denied by the Fourth Circuit on June 3, 1982 and by Chief Justice Burger on June 23, 1982. This case is now before the district court on remand. Discovery with respect to the intervention motion is scheduled to be concluded on October 15, 1982, and a hearing on the motion is expected to be conducted in November.

These contentions are without merit. The decision of the Court of Appeals raises no issues that merit consideration by this Court. It is fully consistent with the decisions of this Court and other lower courts and raises no questions of exceptional importance.

I. THE DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THOSE OF OTHER LOWER COURTS

Western Electric argues that the decision below is in conflict in three different ways with decisions of this Court and of the other lower courts. There are, in fact, no such conflicts.

A. The Decision Below Is Consistent With This Court's Decisions In *Falcon* and *Rodriguez*

Western's first contention is that the Court of Appeals' holding that the district court should reconsider the motion to intervene is inconsistent with this Court's decisions in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), and *General Telephone Co. of the Southwest* v. *Falcon*, 102 S. Ct. 2364 (1982). Those cases hold that under Rule 23(a) of the Federal Rules of Civil Procedure a named plaintiff in a class action must, in his individual claim, raise issues of law or fact that are in common with and typical of the class claims. Thus, this Court held in *Falcon* that an individual who had alleged discrimination by a company in promotions could not represent individuals discriminated against in hiring, unless he could demonstrate that his claim of discrimination in promotions shared issues of law or fact in common with the hiring discrimination claims. 102 S. Ct. at 2371.

The Court of Appeals in this case was well aware of these principles. In fact, the Fourth Circuit's prior decision in this case in *Hill I*, in which it held that named

plaintiffs discriminated against by Western in promotions could not represent a hiring discrimination class, anticipated this Court's decision in *Falcon*.

The mandate of the Court of Appeals is fully consistent with this Court's decisions in *Falcon* and *Rodriguez*. The court has simply directed the district court to consider whether the proposed intervenors will in fact be appropriate representatives of those discriminated against in hiring by Western. On remand, the district court will conduct the "rigorous analysis" required under Rule 23(a) to determine if these proposed intervenors have raised issues of law or fact in common with that class and have asserted claims typical of the class.

Western does not dispute that intervention will only be allowed here if it is found that the proposed intervenors meet the commonality and typicality requirements of Rule 23, as construed in *Falcon* and *Rodriguez*. Rather, what Western contends is inconsistent with *Falcon* and *Rodriguez* is the court's holding below that if the district court allows intervention it would not necessarily be precluded from reinstating its findings of hiring discrimination by Western.

Western argues that under *Falcon* and *Rodriguez* the absence of proper named plaintiffs before the district court at the time of trial renders the district court's findings fatally flawed and incapable of reinstatement. (Pet. at 9-10)

There is no basis for this contention. As discussed in the next section, this Court has specifically held that the absence of proper named plaintiffs does not necessarily render the proceedings in a case a complete nullity. So long as the interests of those whom the plaintiffs sought to represent were adequately represented, so long as the lack of proper plaintiffs did not prejudice the defendants,

and so long as proper plaintiffs intervene, the proceedings may, upon certain circumstances, be given effect. *See Mullaney* v. *Anderson*, 342 U.S. 415 (1952).

This Court did not suggest in *Falcon* or *Rodriguez* that the lack of commonality or typicality between named plaintiffs' claims and those of the class would necessarily mean inadequate representation of the class members or that the defendants would suffer prejudice. This Court's primary concern, rather, was that in the absence of proof of commonality and typicality the goal of judicial efficiency that underlies the class action procedure would not be served. *See General Telephone Co. of the Southwest* v. *Falcon*, *supra*, 102 S. Ct. at 2370, 2372.

It may be, of course, that in some cases the absence of proper representatives will lead to inadequate class representation or will prejudice the defendant. But in this case the Court of Appeals found no such prejudice and, indeed, Western points to none. In the absence of any such prejudice, there is no reason why the district court should not be able, upon the addition of proper representatives, and provided the other conditions are met, to reinstate its findings of hiring discrimination.

In attempting to create a conflict between the decision below and *Falcon*, Western also makes much of the fact that this Court has recently remanded the case of *Brown* v. *Eckerd Drugs, Inc.*, 663 F.2d 1268 (4th Cir. 1981), to the Fourth Circuit for reconsideration in light of *Falcon*. *See* 102 S. Ct. 2952 (1982). Western attempts to piggyback on that decision by claiming that this case "is a sister case to *Brown* and rests on precisely the same doctrinal footing" (Pet. at 8), and should therefore also be remanded for reconsideration in light of *Falcon*.

This case has nothing to do with *Brown*. In *Brown* the court held that certain named plaintiffs who had claimed

discrimination in being dismissed or demoted had standing to challenge other discriminatory practices of the defendant. *See* 663 F.2d at 1274-77. This Court remanded the case for reconsideration of that finding in light of *Falcon*.

Western attempts to make this case into a "sister case" of *Brown* by arguing that both cases "involved situations where named plaintiffs were improperly allowed to litigate overly broad class claims." (Pet. at 10 n.13) What Western does not mention is that in *Brown* the Fourth Circuit allowed the plaintiffs to litigate overly broad claims, requiring this Court to remand the case for reconsideration in light of *Falcon*. In this case the Fourth Circuit itself held in 1979, in *Hill I*, that the plaintiffs were improper representatives. That decision became final in 1979 and was not before the Fourth Circuit in this appeal. Thus, the issue on which remand was granted in *Brown* ceased to be a part of this case three years ago, and was in fact decided consistently with *Falcon* at that time.[6]

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[6] Western also contends that both cases involved "post-trial intervention by a party for purposes of preserving favorable findings of fact." (Pet. at 10 n.13). While this issue is involved in this case, it was not a factor in the *Brown* remand. Although a class member did intervene in *Brown*, the Fourth Circuit held that in light of its finding that the original plaintiffs were proper, it did not have to consider whether the intervention would have cured a lack of standing by the original plaintiffs or allowed for preservation of the findings of fact in those circumstances. *See* 663 F.2d at 1275.

B. The Holding Below That Findings Of Hiring Discrimination May Be Reinstated Is Consistent With Decisions Of This Court And Of Other Lower Courts

Western Electric maintains that where a court renders findings, even though it lacked jurisdiction to do so, or even though improper named plaintiffs were before it, those findings are a complete nullity, and that even if the defect in jurisdiction or standing is cured, the court is without power to reinstate its findings. Western suggests that the holding below that reinstatement may be possible is an "exceptional" holding in conflict with decisions of this and other courts.

This is incorrect. It is well established that a defect in jurisdiction or in standing that does not prejudice the parties does not render the proceedings before the court null and void. Once the defect is corrected, and jurisdiction or standing restored, the proceedings may be given full effect.

One of the leading cases on this point is *Finn* v. *American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). In *Finn* it was determined after trial that the court had not had jurisdiction to hear the case before it because of a lack of complete diversity among the parties. On remand, the plaintiffs moved to dismiss certain parties, thereby perfecting diversity and giving the court jurisdiction. The trial judge, however, refused to reinstate his prior findings, holding that since he had been without power to issue them in the first place, he could not reinstate them. The Fifth Circuit reversed, holding that the action taken by the plaintiff to give the court jurisdiction related back to the time of the original action. So long as the defendant had not been prejudiced by the jurisdictional error, the court held, there was no reason why the correction should not be given retroactive effect. To do otherwise would, the court

said, be a tremendous waste of judicial resources. *Id.* at 114-16.

In *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir. 1969), the Fifth Circuit applied *Finn*, holding that the case stands for the proposition

> "That where a first trial was free from error apart from a jurisdictional matter, a new trial was not mandatory and judgment could be entered on the original verdict after the correction of the jurisdictional flaw by the dismissal of a non-diverse defendant." *Id.* at 732.

In *Dunlop* v. *Rhode Island*, 398 F. Supp. 1269 (D.R.I. 1975), the court held that it could adopt the findings and conclusions it had previously reached, even though it lacked jurisdiction at the time it reached them. The *Dunlop* court, in adopting its previous findings, stated, in language equally applicable here, that it could see "no useful purpose in re-examining the evidence and redetermining its findings." *Id.* at 1273.

This Court has taken an identical approach with respect to the type of defects in standing at issue here. In *Mullaney* v. *Anderson*, *supra*, a fishermen's union and its secretary-treasurer sued to enjoin the Alaska tax commissioner from collecting certain fees from out-of-state fishermen. After trial, and after an appeal to the Ninth Circuit, which resulted in a victory for the plaintiffs, the defendant, in its appeal to this Court, "for the first time . . . questioned the standing of respondent union and its Secretary-Treasurer to maintain this suit." 342 U.S. at 416. In response, the plaintiffs moved to allow the addition of two plaintiffs who had standing. This Court allowed the addition of the plaintiffs, holding that their addition would not "embarrass the defendant" and that their earlier joinder would not have affected the

course of litigation. The Court noted that the original plaintiffs had been acting on behalf of the new plaintiffs. Thus, the Court held, to allow addition of these plaintiffs "merely puts the principal, the real party in interest, in the position of his avowed agent." *Id.* at 417. The original plaintiffs here were, likewise, acting on behalf of the proposed intervenors, each of whom is a member of the class represented at trial, even though, like the plaintiffs in *Mullaney*, they lacked standing to do so. The addition of these intervenors at trial would not have affected the course of litigation.[7] The trial was conducted on the class issues only, and not on the individual claims of the class representatives. The substitution of these class members for their former agents thus works no prejudice on the defendant.

Mullaney conclusively demonstrates that the lack of standing by plaintiffs to raise certain issues does not render the court's ruling on those issues null and void, so long as the defect in standing is corrected and did not prejudice the defendant. The *Mullaney* Court noted that the alternative to such a rule would be to dismiss the action. This Court found that untenable, since

> "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.* at 417.

The same holds true here. The alternative to allowing the original defect in standing to be cured would be to dismiss the action and compel the proposed intervenors to start from scratch in the pursuit of relief from Western.

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[7] If, in fact, their addition would have affected the prior litigation, Western is afforded an opportunity to present such arguments to the district court upon remand.

Western contends that whatever the validity of *Finn* and similar cases, those cases have been undercut by this Court's recent decision in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981). In *Firestone* this Court affirmed a decision of the Eighth Circuit that it did not have the power to hear an interlocutory appeal of an order denying a motion to disqualify counsel. The Eighth Circuit had held, however, that it would only apply its holding prospectively, and thus proceeded to decide the merits of the case before it. This, the Court said, was improper. This Court held "that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits." *Id.* at 379 (footnote omitted).

Based on this rather unremarkable observation that a court cannot decide matters outside of its jurisdiction, a principle surely known at the time of *Finn*, Western contends that the district court's consideration of the hiring issues is a nullity. *Firestone* stands for nothing of the sort. Obviously, a court that lacks jurisdiction, or which has plaintiffs without standing before it, cannot decide issues. And any such decisions that are made while the defect was present are properly vacated.[8] The question presented here is whether, once that defect is corrected, and the court acquires jurisdiction, or plaintiffs with standing intervene, its previous actions are a nullity which must be completely ignored or, rather, are capable under certain circumstances of being reinstated. This issue never arose in *Firestone*, since the jurisdictional defect was not curable. *Mullaney*, *Finn*, and similar

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[8] This, likewise, is all that the portion of *Blum* v. *Yaretsky*, 102 S. Ct. 2777 (1982), relied on by Western (Pet. at 21), stands for.

cases demonstrate, however, that if the defect did not prejudice litigation of the case, and the defect is cured, the court's actions need not be null and void. This is all that the court below held here.

Western also places great reliance on a series of cases that hold that a judgment that is vacated, whether because the court lacked jurisdiction or otherwise, is void and has no precedential or *res judicata* effect. (Pet. at 23) These cases have no bearing on the issue here. The question is not whether the judgment, once vacated, has any effect. It obviously does not. The question is whether, where a judgment is vacated for jurisdictional reasons, the court that entered the judgment can, once it acquires jurisdiction, readopt the judgment.[9]

The sole cases relied on by Western for the proposition that reinstatement may not take place are *DeNafo* v. *Finch*, 436 F.2d 737 (3d Cir. 1971) and *City and County of Denver* v. *Matsch*, 635 F.2d 804 (10th Cir. 1980). (Pet. at 23-24) Western's reliance on *DeNafo* for this proposition is puzzling, since it nowhere discusses the issue. As for *City and County of Denver*, it does not deal with

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[9] It is highly instructive to note that in its briefs in both the district court and the Court of Appeals, Western Electric also grouped among these cases *Dunlop* v. *Rhode Island*, *supra*. In *Dunlop*, the court held that findings that have been entered by a court that lacks jurisdiction do not have precedential or *res judicata* value. That is all that Western's cases stand for. But in *Dunlop* the court went on to hold, as discussed above, that it could nonetheless reinstate those findings once it acquired jurisdiction. It is that second step that is at issue here. *Dunlop* makes clear that the cases cited by Western are in no way inconsistent or in conflict with the decision below. Apparently, now that this has three times been pointed out to Western in briefs before the district court and Court of Appeals, it has chosen to drop *Dunlop* from its litany of cases.

reinstatement of findings of fact. In *City and County of Denver* a citizens' group sought to challenge the display of a nativity scene on public property. The Court of Appeals found, following an evidentiary hearing on the matter in the district court, that the citizens' group lacked standing to sue, and ordered the district court to vacate its judgment. On remand, the district court attempted to provide the citizens' group with an opportunity to present evidence demonstrating its standing to sue. On petition for a writ of prohibition, the Tenth Circuit held that the citizens' group had been given an opportunity to prove standing and, having failed to do so, would not be given a second chance. *Id.* at 807-08. That situation is not the one presented here, where under legal standards existing at the time of trial the plaintiffs did have standing and it only became apparent, after trial and a change in legal standards, that standing did not exist. An opportunity has never been presented for the class to seek to meet these legal standards, and they should be provided with that opportunity now. *Compare Sierra Club* v. *Morton*, 405 U.S. 727, 735-36 n.8 (1972), *on remand*, 348 F. Supp. 219 (N.D. Cal.) (Plaintiff given opportunity to amend complaint and add parties after this Court held, in resolving a previously unaddressed question, that plaintiff lacked standing).[10]

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[10] The court below recognized that this case involves the circumstance, anticipated by this Court in *Rodriguez*, where it only becomes apparent after trial that the named plaintiffs are improper representatives. Under such circumstances, this Court said, the class claims need not be destroyed. (*See* App. 12a n.4)

C. The Court Below Did Not Hold That "Success On The Merits" Cures Rule 23 Standing Defects

Western attempts to conjure up a conflict in the circuits by contending that the court below held "that success on the merits magically cures all defects in class composition and representation, and thus permits reinstatement of unreviewed findings on issues not properly litigated." (Pet. at 11) Western seeks by this misstatement of the court's holding to cast it in conflict with cases that have held that success on the merits does not demonstrate that plaintiffs are adequate class representatives.

The Court of Appeals did not hold that success on the merits by the original named plaintiffs cured anything.[11] Rather, it held that the defects in class composition and representation might be resolved if, and only if, the proposed intervenors can demonstrate that they are adequate Rule 23 representatives and can delineate a proper class for certification.[12] The court recognized that the original named plaintiffs were *not* proper representatives, and that this defect was not cured in any way by their success in representing the class.

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[11] The Court of Appeals' sole discussion of success on the merits came in the context of its discussion of whether reinstatement of the findings would be prejudicial to any party. The court noted that any claim of prejudice to the class was belied by the fact that the class was successful in its claims. (App. 16a) The court never even implied, however, that this success rendered the original named plaintiffs proper Rule 23 representatives or vitiated the need for the proposed intervenors to demonstrate independently that they are proper representatives.

[12] Western notes that in *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), the court, after holding that the original named plaintiffs did not have standing to represent the entire class, denied a petition for reconsideration seeking a modification to make it clear that new plaintiffs with standing could intervene. Western

II. THE DECISION BELOW WILL NOT GIVE RISE TO "SPURIOUS CLASS ACTIONS"

Western suggests that the Court of Appeals' decision would allow courts to certify broad classes, regardless of the scope of the named plaintiffs' claims, and then allow proper named plaintiffs to come forward after judgment to cure the defect. Western contends that this would open the door to "spurious class actions" and "one-way intervention."

Western's argument is that "the Fourth Circuit has established a form of class representation that grants any litigant a trial run on any class action claim, and then permits class counsel, if successful on the merits of claims that should not have been litigated in the first instance, to obtain intervenors and thereby legitimate the proceedings." (Pet. at 15)

Western paints a scenario where clever class counsel will make sure that they have improper class representatives so that in the event they lose their case the class can claim inadequate representation but can, in the event they win, intervene with proper class representatives and preserve the findings.

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concludes from this that the Fifth Circuit has now held that the possible intervention approved by the Fourth Circuit here has been rejected by the Fifth Circuit.

In fact, the Fifth Circuit, in its original decision in *Payne*, took no position as to what the district court should do on remand with respect to intervention. The court's denial of a petition for rehearing cannot be read as a rejection of intervention as one option. This posture was in fact precisely the posture adopted by the Fourth Circuit in *Hill I*, and neither the district court nor the Fourth Circuit has read such a position to mean that intervention is precluded. *See* n.16, *infra*.

In Western's scenario, class counsel will engage in "gamesmanship" to assure that they will be protected from an unfavorable outcome. Indeed, Western implies that counsel for respondents herein engaged in such gamesmanship by not bringing forth proper named plaintiffs at the outset of the trial in this case, even though there is "no reason" why they could not have done so. (Pet. at 18)

This entire argument is baseless. It rests on the assumption that class counsel *and* the district courts will cavalierly ignore the representation rules laid down by this Court in *Falcon* and *Rodriguez*.

There is absolutely no reason to believe that this will occur. A court, even if it certified an overly broad class in the first instance, would still have to determine after trial, and before judgment, that there were class representatives capable of representing the class in accordance with Rule 23, as construed in *Falcon* and *Rodriguez*. Western does not explain why a court would choose not to comply with the rules set forth in those cases in certifying a class in the first place, nor why a court would ignore the requirement of proper named plaintiffs throughout the trial of a class action and before entering judgment. The only reason the district court did not conform to *Rodriguez* in certifying the class in this case is that *Rodriguez* was not decided until over a year after the court handed down its decision on the merits. Under the law of the Fourth Circuit as it stood throughout the trial, the district court's certification order was correct. *See Hill I*, 596 F.2d at 101. This case thus presents unusual circumstances, involving the impact of a subsequent change in law, that are hardly likely to be repeated, and certainly not in the fashion Western suggests.

III. THE COURT BELOW APPLIED A PROPER STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT

Western contends that the Court of Appeals applied an improper standard of review in reversing the district court. Western's argument is that the Court of Appeals substituted its factual judgment for that of the district court. (Pet. at 25)

This is incorrect. The court did not substitute its view of the facts for the district court's. The district court had given two reasons for denying intervention. As to the first, the Court of Appeals held that the mere fact that the case had been going on for a long time was, as a matter of law, an insufficient basis for denying intervention.

As for the second reason, the impracticality of bifurcating the case, the Court of Appeals found that there was absolutely no evidence in the record to support the district court's conclusion that bifurcation of the case would be too difficult. (App. 7a-8a)[13]

The Court of Appeals did not supplant findings of fact by the district court with its own. It did find that the

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[13] Western states that the Court of Appeals "recognized that additional litigation, delays, and prejudice would result from intervention . . . but concluded that such prejudice 'was given greater weight [by the district court] than *general experience warrants*.' " (Pet. at 5 n.6) This is an incredible mischaracterization of the decision below. The district court had concluded that bifurcation would be "impractical." The Court of Appeals held that "the impracticality envisioned was given greater weight than general experience warrants." (App. 8a) It never found that bifurcation would result in *any* prejudice. To the contrary, it expressly found that "[a]ny prejudice to other members of the class *could have been avoided*, however, by simply bifurcating the proceedings." (App. 7a) (emphasis added)

conclusions drawn by the district court were either legally incorrect or factually unsupported on the record.[14]

IV. THE COURT OF APPEALS' DECISION IS NOT RIPE FOR REVIEW BECAUSE OF THE PRELIMINARY LEGAL AND FACTUAL DISPUTES THAT REMAIN FOR RESOLUTION UPON REMAND

Finally, it should be emphasized that the appellate court found the present record significantly lacking in that the district court never addressed certain "preliminary" issues regarding the ability of the proposed intervenors to sue. Nor has the district court yet determined whether the proposed intervenors meet the rigorous requirements of Rule 23.

These issues were never addressed by the district court and may be dispositive of this case on remand before the district court even considers whether intervention or reinstatement is appropriate.[15] The Court of Appeals has

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[14] Western also claims that the Court of Appeals improperly added as a factor to be considered in ruling on the intervention motion the possibility of reinstatement of the findings. Western contends that this is precluded by the language of Rule 24(b), and that the court is limited to considering the timeliness of the motion, the common questions of law or fact raised by the intervenor, and prejudice to existing parties. In fact, Rule 24(b), while directing the courts to consider those criteria, by no means makes those the exclusive factors to be considered. It is clear, for example, that "[t]he court also will consider whether the applicant will benefit by intervention." 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1913, at 554 (1972). It was plainly proper for the Court of Appeals to direct that the benefits to the intervening class members from possible reinstatement be considered.

[15] Western argues that this case is ripe for appeal because, it speculates, had the court below not found reinstatement to be possible under certain circumstances, it would not have reversed the district court and remanded the case for further consideration of the

not stated that intervention or reinstatement should take place. It has merely directed the district court to give further consideration to such matters.[16] Given the current state of the record, which shows that intervention and reinstatement is only a possible outcome, and one that may never be considered, let alone reached, this case is particularly unsuited for review by this Court.

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preliminary issues or of the qualifications under Rule 23 of the intervenors. (Pet. at 7 n.8) The fact is, however, that, as found by the Court of Appeals, the two reasons given by the district court for denying intervention were totally without foundation in the record and were insufficient reasons for denying intervention. (*See* App. 5a-8a)

[16] Western contends that it is improper for the court below to have even allowed reconsideration of these matters because, it argues, the Court of Appeals already disposed of the hiring claims finally in its prior decision in *Hill I*. Western argues that in allowing the district court to consider intervention and reinstatement of the judgment with respect to hiring discrimination, the Court of Appeals has effectively overturned its previous decision, in violation of the doctrine of the law of the case. (Pet. at 20 n.28)

That contention is incorrect. If the Court of Appeals had wished in *Hill I* to render a final judgment effectively terminating the hiring portion of this case, it could have done so by dismissing that portion of the case, rather than remanding to the district court. It did not do so. It left the decision as to the subsequent disposition of the hiring claims to the district court. Judge Bryan expressly construed *Hill I* as not precluding him from considering intervention. (App. 40a) The Fourth Circuit construed its own mandate in precisely the same way. (App. 5a n.1) The actions taken by the district court and the Court of Appeals following remand were fully consistent with the Court of Appeals' original mandate.

CONCLUSION

For the foregoing reasons, Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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